

Editor's note: Reconsideration granted; decision vacated in part -- See 80 IBLA 317 (May 7, 1984).

MICHIGAN WISCONSIN PIPELINE CO. ET AL.

IBLA 81-349

Decided May 28, 1982

Appeals from a decision of the Wyoming State Office, Bureau of Land Management, canceling oil and gas lease W 49836 and declaring overriding royalties null and void.

Affirmed as modified in part, reversed in part, and remanded.

1. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases:
Applications: Sole Party in Interest -- Oil and Gas Leases:
First-Qualified Applicant

When an individual files an oil and gas lease offer through a leasing service under an agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sub-lease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and in any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b) (1979).

2. Oil and Gas Leases: Applications: Drawings -- Oil and Gas Leases:
Assignments or Transfers -- Oil and Gas Leases: Bona Fide Purchaser

A party purchasing an oil and gas lease from the first-drawn winner of a drawing of simultaneous offers to lease is a

bona fide purchaser where prior to and during the time it agreed to purchase the lease, paid consideration, and requested approval of the assignment, BLM's files were silent as to any irregularities in the lease or offer and the purchaser had no knowledge of any defect in the lease or offer.

3. Oil and Gas Leases: Bona Fide Purchaser -- Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Overriding Royalties

An overriding royalty interest retained by a lessee after he has assigned the lease to a bona fide purchaser is voidable and properly canceled where it is revealed that the lessee's original lease offer failed to disclose the existence of another party in interest in the offer. Any overriding royalties which the lessee assigned to the other party in interest are also properly canceled, as this party is not a bona fide purchaser thereof, having had actual knowledge of the defect in the lease. BLM should, on remand, sell these canceled overriding royalty interests as provided in 30 U.S.C. § 184(h) (1976).

4. Oil and Gas Leases: Suspensions

The applicable statute, 30 U.S.C. § 184(j) (1976), and regulation, 43 CFR 3108.3(e), authorize the granting of a suspension of lease term and obligation to pay rental where, during a proceeding described therein, a party files with the Secretary a waiver of his rights under the lease, including particularly, where applicable, rights to drill and to assign.

APPEARANCES: B. Lee Ware, Esq., Houston, Texas, for Michigan Wisconsin Pipeline Company; David B. Kern, Esq., Milwaukee, Wisconsin, for Marlin H. Schneider and Resource Service Co., Inc., Howard L. Boigon, Esq., Denver, Colorado, for Harrell and Bradshaw, a partnership; Melvin E. Leslie, Esq., Salt Lake City, for Geosearch, Inc., and John A. Kochergen; and Laura L. Payne, Esq., Denver, Colorado, for General American Oil Company of Texas; Harold J. Baer, Jr., Esq., Office of the Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Michigan Wisconsin Pipeline Company (Michigan Wisconsin); Marlin H. Schneider; Resource Service Company, Inc. (RSC); Harrell and Bradshaw, a partnership; Geosearch, Inc. (Geosearch); John A. Kochergen; and General American Oil Company of Texas (General American) appeal from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated January 14, 1981, canceling oil and gas lease W 49836 and declaring the overriding royalties of RSC and Schneider null and void ab initio. This same decision also held that assignees Harrell, Bradshaw, Michigan Wisconsin, and General American were not bona fide purchasers.

The drawing entry card (DEC) of Marlin H. Schneider was drawn with first priority for parcel 232 in the February 1975 drawing of simultaneous oil and gas lease offers. On April 3, 1975, lease W 49836 was issued to Schneider, effective May 1, 1975, and the DEC's of those persons drawn with second and third priority were returned as rejected. On April 21, 1975, Schneider executed an assignment of full record title to J. S. Harrell while reserving to himself a 5 percent overriding royalty. This assignment was approved by BLM on June 3, 1975, effective June 1. Shortly thereafter on June 18, 1975, Harrell executed an assignment of his interest in lease W 49836 to Michigan Wisconsin, effective August 1, 1975. This assignment was approved by BLM on July 24, 1975, with a 2 percent overriding royalty reserved to Harrell. A further assignment was executed on August 22, 1975, when Michigan Wisconsin sold an undivided 50 percent interest in the lease to General American. This assignment was approved by BLM on October 14, 1975, effective October 1. On April 12, 1976, Harrell executed an assignment of 1 percent of overriding royalties to Donald D. Bradshaw. Finally, on November 9, 1977, Schneider filed an assignment of a percentage of his overriding royalties to Fred L. Engle, d.b.a. Resource Service Company.

Some 4-1/2 years after lease W 49836 had issued to Schneider, Geosearch protested the issuance of this lease, alleging that the agreement in effect between Schneider and Engle prior to the filing period created an interest in Engle which Schneider failed to disclose contrary to 43 CFR 3102.7 (1979). ^{1/} In view of the fact that numerous customers of Engle having the same agreement filed on this parcel, Geosearch continued, there resulted a violation of 43 CFR 3112.5-2 (1979) prohibiting multiple filings. Geosearch further alleged that it had succeeded to the interest of John A. Kochergen, whose DEC was drawn with third priority for parcel 232.

Responding to this protest, BLM obtained a copy of Engle's agreement with Schneider and issued an order to show cause to each of the assignees to determine whether the assignees were bona fide purchasers. Michigan Wisconsin and General American moved to dismiss the protest of Geosearch; Harrell and Bradshaw did not plead, their order to show cause having been returned to BLM for lack of a current address.

^{1/} This regulation has been subsequently amended and is found in its altered form at 43 CFR 3102.2-7.

In its January 14, 1981, protest decision, BLM held that RSC's service agreement with Schneider was identical to that in Frederick Lowey, 40 IBLA 381 (1979); Alfred L. Easterday, 34 IBLA 195 (1978); Sidney H. Schreter, 32 IBLA 148 (1977); and Lola I. Doe, 31 IBLA 394 (1977). In these decisions, the Board held that RSC's agreement with its client gave RSC an interest in the offer of its client. When the client's offer was submitted to BLM without disclosure of RSC's interest, it was found to violate 43 CFR 3102.7 (1979) requiring disclosure of such interests. In addition, these same decisions held that an attempted waiver/disclaimer by RSC to renounce its exclusive agency, filed on January 13, 1977, was ineffective to achieve this effect, because it was a unilateral action unsupported by consideration and was not communicated to the other parties.

As set forth above, BLM's decision of January 14 also held that Harrell, Bradshaw, Michigan Wisconsin, and General American were not bona fide purchasers of lease W 49836. In its response on appeal, however, the Office of the Solicitor, citing this Board's decisions in Wilbur G. Desens, 54 IBLA 71 (1981); Inexco Oil Co., 54 IBLA 260 (1981); and Home Petroleum Corp., 54 IBLA 194, 88 I.D. 479 (1981), aff'd, Geosearch v. Watt, No. C 81-0208 (D. Wyo., filed Aug. 7, 1981), stated that BLM believes its decision with respect to Michigan Wisconsin and General American should be reversed and their interests protected as remote purchasers. 2/

[1] We have considered the question of the validity of offers filed by RSC's clients in these circumstances many times in the past and have held consistently that such offers must be rejected. Home Petroleum Corp., *supra*, and cases cited therein. The service agreement in effect at the time Engle filed Schneider's offer gave Engle an interest in this offer which was required to be disclosed by regulation. Schneider's failure to disclose this interest at the time he made his offer, contrary to 43 CFR 3102.7 (1979), was adequate grounds for rejection of this offer.

While RSC and the first drawee still dispute the determination that the leasing service agreements gave RSC an "interest" in the first drawee's offer, their appeals focus on what they term the retrospective application of the Lola I. Doe decision, *supra*. RSC and Schneider refer to the January 13, 1977, waiver/disclaimer as evidence of their good faith.

RSC's retrospective effect argument has been considered and rejected in a number of cases. See, e.g., Inexco Oil Co., *supra*; Home Petroleum Corp., *supra*; D. R. Weedon, Jr., 51 IBLA 378 (1980), appeal dismissed, Weedon v. Watt, No. 81-749 (D.D.C. Oct. 9, 1981). As we noted in D. R. Weedon, Jr., *supra*, neither RSC nor its clients had the status of "innocent offerors"

2/ BLM has moved to apply the doctrine of collateral estoppel or res judicata to dismiss the appeals of RSC and Schneider. Inasmuch as Schneider has not appeared in any of the proceedings involving similar issues and facts, and as there are other parties involved, it is appropriate to issue a decision herein, and BLM's motion is denied. See Robert Semanko, 58 IBLA 340 (1981) at n.1.

inasmuch as both had participated in the creation of the illegal interest. We also pointed out:

No one who held or granted the exclusive right to participate in a precise share of any proceeds from the sale or assignment of the lease and from any proceeds derived from retained overriding royalties could possibly entertain any serious doubt that such a right constituted an "interest" within the context of this regulation.

* * * To hold that, upon a finding of violation, the Department must forego remedial action until a similar violation is discovered in the future would be to hold that a person may violate the regulation with impunity until discovered, but not thereafter.

Even though Schneider's offer was defective, the lease issued pursuant to this offer may not be canceled if it has been assigned to a bona fide purchaser. 30 U.S.C. § 184(h)(2) (1976); 43 CFR 3102.1-2 (1979). Following the Solicitor's pleading stating that BLM believes that Michigan Wisconsin and General American should be protected as remote purchasers, there remains the question whether Harrell and Bradshaw are bona fide purchasers. We believe that each so qualify; we reverse BLM's holding in this respect, and reinstate these interests.

In order to determine whether an assignee is a bona fide purchaser, it is necessary to examine the state of his knowledge, both actual and constructive, at the time of the assignment. Winkler v. Andrus, 614 F.2d 707, 712 (10th Cir. 1980); O'Kane v. Walker, 561 F.2d 207 (10th Cir. 1977); Southwestern Petroleum Corp. v. Udall, 361 F.2d 650, 656 (10th Cir. 1966). Assignees of Federal oil and gas leases who seek to qualify as bona fide purchasers are deemed to have constructive notice of all of the BLM records pertaining to the lease at the time of the assignment. Winkler v. Andrus, supra at 713; O'Kane v. Walker, supra at 212; Southwestern Petroleum Corp. v. Udall, supra at 655-56. An assignee is not required to go outside the BLM records relating to the particular parcel of land assigned. Id.

In order to determine the bona fides of Harrell and Bradshaw, we must first determine when the assignment occurred. The general rule is that the relevant date is the date that the consideration for the assignment was paid. Winkler v. Andrus, supra at 712, citing 77 Am. Jur. 2d, Vendor & Purchaser § 706 (1975). Nevertheless, the Tenth Circuit stated in Winkler that the critical determination time was instead when the agreement was formed, but it did not need to resolve this issue, as the result was the same in either case. Here, as in Winkler, it is immaterial whether the critical time is the date the parties agreed to the assignment or the date consideration was paid.

Schneider's assignment of full record title to Harrell was executed on April 21, 1975, and filed with BLM on May 14, 1975. Harrell's assignment of 1 percent overriding royalties to Bradshaw was executed on April 12,

1976, and filed with BLM on May 4, 1976. BLM did not approve this latter assignment, as it does not routinely approve assignments of overriding royalties but merely puts them into its records for information purposes. It is not clear from the record exactly when assignees Harrell and Bradshaw paid the consideration for their assignments, although it was probably before filing their assignments with BLM.

[2] Regardless of which date is determined to be the relevant date, the official file for lease W 49836 contained no suggestion of impropriety or irregularity until October 4, 1979, when Geosearch filed its protest. Lola I. Doe, supra, the case first identifying Engle's interest in the offers of his clients, was not released until August 1977. BLM relied on Winkler v. Andrus, 494 F. Supp. 946 (D. Wyo. 1980), to support its finding that Harrell and Bradshaw were not bona fide purchasers. As set forth in Home Petroleum Corp., supra at 207-10, we believe that BLM's reliance on Winkler is misplaced in a factual setting such as this and accordingly we reinstate the interests of assignees Harrell and Bradshaw. This same analysis supports a finding that Michigan Wisconsin and General American are also bona fide purchasers whose interests should be similarly reinstated.

[3] We disagree with BLM's holding that the retained overriding interests now held by Schneider and Engle were null and void ab initio. As set forth more fully in Home Petroleum Corp., supra, we regard these interests as merely voidable and subject to cancellation. Consistent with our decision in that case, BLM on remand should cancel the overriding royalties of Schneider and Engle and sell those interests in accordance with the terms of 30 U.S.C. § 184(h)(2) (1976). Counsel's arguments to the contrary are addressed in Home Petroleum Corp., supra at 211-12.

[4] Pursuant to 30 U.S.C. § 184(j) (1976) and 43 CFR 3108.3(e), appellants Michigan Wisconsin and General American have each filed a petition for suspension of lease term and rentals. The statute, 30 U.S.C. § 184(j) (1976), provides in relevant part:

If during any such proceeding [with respect to a violation of any provision of this chapter], a party thereto files with the Secretary a waiver of his rights under his lease (including particularly, where applicable, rights to drill and to assign), * * * payment of rentals and running of time against the term of the lease or leases involved shall be suspended as of the first day of the month following the filing of the waiver or suspension of the rights until the first day of the month following the final decision in the proceeding or the revocation of the waiver or suspension.

BLM's March 7, 1980, order to Michigan Wisconsin and General American to show cause why lease W 49836 should not be canceled may be fairly regarded as the commencement of a proceeding with respect to a violation of the appropriate chapter. The waivers on file of each petitioner specifically include the

rights of petitioner to drill and to assign its lease interest. Petitioners filed such waivers on March 9 and 10, 1981. In accordance with the statute and regulation, we hereby suspend the payment of rentals and running of time of lease W 49836 as of April 1, 1981, until the first day of the month following the date of this decision. See Order (Mar. 4, 1981), Home Petroleum Corp., IBLA 81-224.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed as modified in part, reversed in part, and remanded.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Bruce R. Harris
Administrative Judge

